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SUPREME COURT OF THE UNITED STATES

No. 1397

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

677.50 ACRES OF LAND IN MARION COUNTY, KANSAS; KATHERINE E. VOGEL, ET AL., AND UNKNOWN OWNERS; 864.04 ACRES OF LAND IN MARION COUNTY, KANSAS; DONALD D. HOLLAR, ET AL., AND UNKNOWN OWNERS; 150.00 ACRES OF LAND IN MARION COUNTY, KANSAS; L. C. CROWE, ET AL., AND UNKNOWN OWNERS (CLEAR CREEK, INC.),
Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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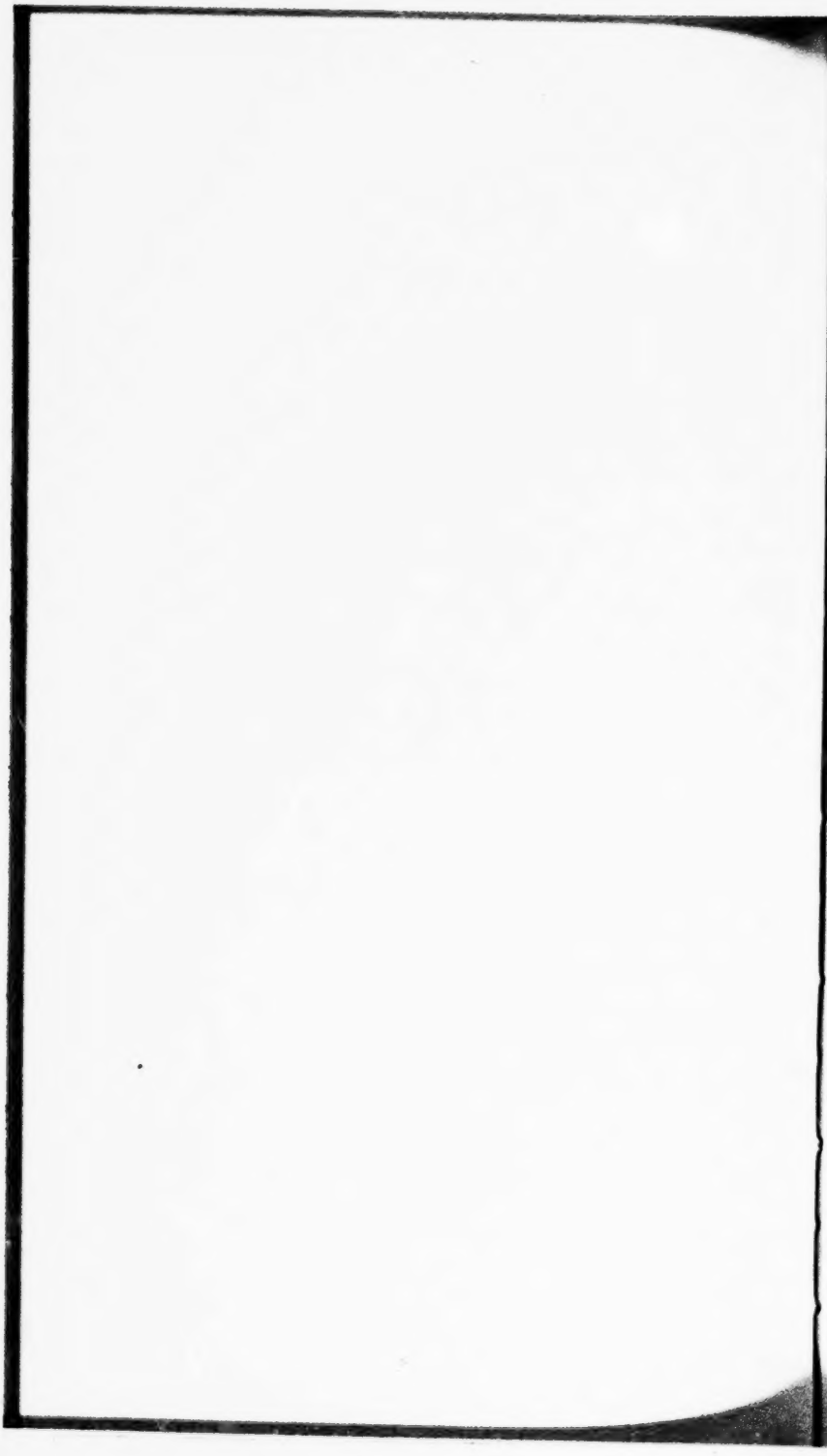

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EME COURT OF THE UNITED STATES

No. _____

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

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Defendants-Petitioners.

TION FOR A WRIT OF CERTIORARI TO THE TED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MES NOW, Clear Creek, Inc., a Kansas corpora-d petitions for a writ of certiorari to review the nt of the United States Court of Appeals for the Circuit reversing a judgment of the United States Court for the District of Kansas, which judg-warded petitioner just compensation under U. S. . Amend. V in a condemnation action filed by the States of America.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, Infra, Pages A1-A8) is reported at ..... F.2d ..... (10th Cir. 1970). The opinion of the District Court (App. B, Infra, Pages A9-A11) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1970. Petitioner's Motion to Dismiss was denied and its Motion for a Stay of the Mandate Pursuant to Rule 41 B of the Federal Rules of Appellate Procedure was granted on March 4, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a crude oil purchasing company which holds irrevocable division order contracts and right-of-way grants with every interest owner in an oil and gas field which has been condemned by the United States has a compensable interest under the U. S. CONST. Amend. V.

CONSTITUTIONAL PROVISION INVOLVED

U.S.C.A. Const. Amend. V provides a pertinent part as follows:

> ". . . nor shall private property be taken for public use, without just compensation."

STATEMENT

This is a federal condemnation proceeding which involves tracts of land that form a major portion of an oil and gas producing area known as the Dobbs Pool in Marion County, Kansas. The Dobbs Pool was discov-

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ered in 1961 and, while small in area, produced considerable oil. The Dobbs Pool is adjacent to the Hillsboro East Pool which was discovered a number of years earlier and covers a larger geographical area than the Dobbs Pool.

Prior to March or April of 1960, Mobil Oil Company was purchasing the oil from the leases in the Hillsboro East area. There was no pipeline facility and the oil had to be trucked from the leases to Mobil's gathering stations. In March or April of 1960, Magnolia Pipeline Company took over operation of all of Mobil's crude oil purchasing in Kansas. However, Magnolia did not want to truck the crude oil from the leases in the Hillsboro East area which left the operators without a buyer for their oil (TR. 10-11).

The petitioner, Clear Creek, Inc., was formed in 1960 for the purpose of providing a market for the operators in this area and commenced operations on June 1, 1960, by trucking the oil from the Hillsboro East area to Mobil's station at Canton, Kansas (TR. 11-13). Clear Creek then constructed a pipeline from the Canton station to connect with the leases in the Hillsboro East area. The Dobbs Pool was discovered shortly after the pipeline was completed. Clear Creek entered into division order contracts with all operators, working interest owners and royalty owners to be serviced by the pipeline. Each of the division orders contain a provision that the division order was irrevocable until 4.5 million barrels of oil had been run through the pipeline (Ex. CC-24; TR. 13, 19).

The normal division order is revocable at will by either party and the unique provision of irrevocability contained in these particular division orders distinguishes Clear Creek from all other crude purchasers.

Clear Creek's cost of laying the pipeline was in excess of $400,000 of which $375,000 was borrowed capital. The reason the 4.5 million barrel figure was contained in the division orders was that it was determined that it would require the purchase of that volume of oil to pay for the cost of the pipeline and repay the obligation to the bank which financed the construction (TR. 13, 16).

The through-put of the pipeline up to the time of the condemnation shows that as of October, 1967, 3,285,-003.57 barrels, or 73% of the 4.5 million barrels had been run through the pipeline. The largest monthly through-put was in October, 1961, when 111,526.65 barrels were purchased. The through-put had decreased to 20,729 barrels in July, 1964, when the first wells were plugged as the result of the condemnation. Purchases were down to approximately 1,500 barrels per month by October 1, 1967. By the time of the condemnation proceedings, most of the leases in the Hillsboro East area had been plugged with the exception of the Dobbs Pool which accounted for a large, and ever-increasing, percentage of all the oil run through the pipeline (TR. 20-26).

The division order contracts provide that Clear Creek will pay all interest holders on the basis of the Mobil posted price in the area for oil of that grade and gravity less 22¢ per barrel as a gathering charge to Clear Creek. Clear Creek also received 5¢ per barrel above the posted price from Mobil for a gross income per barrel of 27¢. Clear Creek had an average operating expense of 18.7¢ per barrel and a net operating profit per barrel purchased of 8.3¢ (TR. 28-31).

Even though Clear Creek's pipeline continued to operate subsequent to the condemnation proceedings, the petitioner's expert witness testified that remaining pro-

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duction will not be sufficient to allow Clear Creek to run 4.5 million barrels through this pipeline (TR. 196-197). The award of damages to Clear Creek by the Commission was calculated by determining the number of barrels of oil per tract that would not be produced as the result of the condemnation which was multiplied by the net profit of 8.3¢ per barrel and discounted to present value (Ex. CC-3 to CC-23; TR. 197-205).

It is important to note that in determining just compensation for the landowners and leasehold estate owners, Clear Creek's interest of 22¢ per barrel was deducted. In other words, if the posted price or market value of the oil was $3.00 per barrel, damages to the owners of the subsurface rights, other than Clear Creek, would be calculated at a price of $2.78 (TR. 219-220).

One other fact is relevant to the issue presented. Obviously, Clear Creek had to construct pipelines in order to transport the oil which it purchased. This was accomplished by obtaining right-of-way grants across each of the leases involved. Therefore, Clear Creek had an interest in the land by virtue of the rights-of-way which were an integral part of the division order contracts (T-4284, Doc. 6).

Damages in the amount of $24,689.19 were awarded to Clear Creek by the Commission appointed by the District Court. The basis of the award was that Clear Creek's vested contract rights and rights-of-way amounted to an equitable servitude upon the property taken. After the award was affirmed by the District Court, an appeal was taken to the Tenth Circuit Court of Appeals which reversed the District Court.

REASONS FOR GRANTING THE WRIT

1. The holding of the lower court that Clear Creek's division orders and right-of-way grants were not property within the contemplation of the Fifth Amendment and were not taken by the condemnation action is in conflict with the decisions of this court in *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945) and *Monongahela Navigation Company* v. *United States*, 148 U.S. 312 (1892). The latter case, which is a landmark condemnation case, involved the Monongahela Navigation Company which was franchised by the State of Pennsylvania to construct locks and dams on the Monongahela River to make it suitable for navigation by the larger steamers of the time. The franchise carried with it the right to collect tolls for use of the river. Eminent domain proceedings were instituted by the United States to condemn part of the improvements constructed by the navigation company. In holding that Monongahela Navigation Company was entitled to compensation, not only for the physical facilities, but also for destroying the right to collect tolls, this court stated:

> "Our conclusions are, that the Navigation Company rightfully placed this lock and dam in the Monongahela River; that, with the ownership of the tangible property, legally held in that place, it has a vested franchise to receive tolls for its use; that such franchise was as much a vested right of property as the ownership of the tangible property; that the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the Navigation Company, is subject to the limitations imposed by the 5th Amendment, that private property shall not be taken for public uses without just compensation; that

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> just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property. . . ." 148 U.S. at 344-345.

The *Monongahela* case is as analogous to the petitioner's situation as any case decided by this court.

Further, the holding of the lower court that the United States did not intend to take Clear Creek's property clearly is in conflict with the holding in *United States* v. *General Motors Corp.*, supra, in which this court said:

> "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." 323 U.S. at p. 378.

2. The decision of the lower court is in conflict with the decisions of other courts of appeal in similar cases. In *Adaman Mutual Water Company* v. *United States*, 278 F.2d 842 (9th Cir. 1960), the plaintiff was a water company formed for the purpose of providing irrigation water and was wholly owned by the people who owned the land that used the water. The Government took a portion of the area served by the water company which had the effect of reducing the area available to the water company for assessment, thereby increasing the amount of the assessment to the other owners of the water company. The court found that the water company was entitled to compensation. The decision was based on the principle that the Government must pay for all tangible or intangible interests which are actually taken and which are directly connected with the physical substance of the thing taken. The Ninth Circuit said:

> ". . . if an interest in land is lost as a result of the taking of the parcel to which the interest attached, a direct connection with the physical substance condemned is established, and the pitfalls of the consequential loss doctrine are avoided." 278 F.2d at p. 846.

The court reasoned that the water project was an integral facet of an overall plan and the duty to pay assessments attached to all the land to which the stock was appurtenant and upon which cultivation had commenced. They found that the duty to pay the assessments as a result of holding the stock in the water company was an equitable servitude or restrictive covenants upon that part of the land condemned by the Government. The water company had lost the benefit derived from this servitude which loss was compensable since the Government had destroyed an intangible right directly connected with the physical substance of the land condemned. The court further pointed out that the benefit derived from the equitable servitude adhered to all of the land within the project and the water rights appurtenant to each parcel of land ran with the land to the same extent as the burden to pay the assessments. Also, they determined that a restrictive covenant was a property right under federal law and rejected the Government's argument that compensation of restrictive covenants in eminent domain proceedings placed an impermissible burden upon the Government. The court felt that a party should receive compensation for any type of right which enhanced the value of his property, regardless of the burden on the Government or the exact nature of the right.

The case from the Fourth Circuit, *United States* v. *Smcot Sand and Gravel Corporation*, 248 F.2d 822 (4th Cir. 1957), plainly supports petitioner's position. A Vir-

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ginia statute gave Smoot, as a riparian owner, the right to dig and sell sand and gravel deposits in the tidal water abutting its land. The court held that Smoot must be compensated in condemnation proceedings taking the lands in which Smoot had these rights. The court said:

> "It cannot be disputed that when one is assigned the right, pending its revocation, to use or consume something to the exclusion of all others, and to receive compensation from anyone who ventures to exercise the privilege without his authority, he has a species of property, regardless of what theory of property we may adopt. Rights in or appurtenant to land, whether dry or under water, even if they amount to less than fee simple title, are property. Whether the right with which the owner is endowed by this statute, is called a revocable though unrevoked 'license,' or a 'profit a prendre,' is immaterial. The label does not matter; the substance cannot be taken away by the United States even for a public use without the owner being made whole." 248 F.2d at 827-828.

In *United States* v. *Puget Sound Power & Light Co.*, 147 F.2d 953, 957 (9th Cir. 1944), the United States condemned city streets on which the power company held franchises for the erection of utility poles and wires. The Ninth Circuit held that it was immaterial whether the franchise was considered a chattel real or an easement under state law and that the power company must be compensated for its franchise just as a party who owns land in fee simple must be compensated when his land is taken or damaged. On rehearing, the court emphasized that since the franchise was revocable it was not merely a contract which was frustrated by the Government.

Two decisions of the Second Circuit appear to conflict with the decision and reasoning of the court below. In *United States* v. *Brooklyn Union Gas Co.*, 168 F.2d 391

(2nd Cir. 1948), a gas company and an electric company owned facilities located on and serving lands condemned by the United States for expansion of the Brooklyn Navy Yard. The facilities had been established and maintained under franchises granted to each company and in effect at the time of the taking. The court had no doubt that the loss was compensable under the Fifth Amendment, but the case was remanded for further proceedings to determine the value of the property so taken with the court stating that future earnings might be considered in determining the value. This language is instructive and bears on the question before this court:

> ". . . this is not an award for business losses, such as was condemned in United States ex rel. T.V.A. v. Powelson, supra, but is a means of finding present worth in a legal interest which must be judged by its productiveness. This same view is stated with respect to a franchise to maintain a bridge in Monongahela Nav. Co. v. United States. . . ." 168 F.2d at 395.

In *Brooklyn Eastern Dist. Terminal* v. *City of New York*, 139 F.2d 1007, 152 A.L.R. 296 (2nd Cir. 1944), cert. den. 322 U.S. 747, Brooklyn Eastern had a ten year contract with the city of New York to construct and operate a freight terminal for the city's Wallabout Market. It was granted the right to construct the necessary float bridge, tracks and track appurtenances to properly equip the terminal. Part of the land occupied by this freight terminal was condemned by the United States and this action was brought by Brooklyn Eastern for a share of the proceeds paid into court. The court held that the various easements granted Brooklyn Eastern were entitled to compensation under the Fifth Amendment and that it was not a case of mere frustration of contract, since easements or interests in land were taken.

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3. Although the decisions of this court and the courts of appeal previously cited are the nearest in point which can be found, it might be said that the question presented in the present case had not been settled by this court because of the rather unique factual situation. Certainly the extent to which irrevocable contract rights connected with right-of-way grants fall within the protection of the Fifth Amendment would be an important question which should be settled by this court as it would have a significant impact upon federal condemnation law. Petitioner submits that a crude oil purchaser in the operation of his right-of-way on the land having irrevocable rights to purchase minerals from the land clearly has such an interest in the land to be entitled to the protection of the Fifth Amendment. The resolution of this question would certainly serve as a guideline in federal condemnation proceedings where there appears to be none at the present time.

CONCLUSION

Because the decision rendered below decides a federal question in a way in conflict with applicable decisions of this court, creates a conflict between the Circuit Courts of Appeal, and decides an important question of federal law which has not been, but should be, settled by this court, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

TENTH CIRCUIT

NOVEMBER, 1969, TERM

UNITED STATES OF AMERICA,
Appellant,

vs.

677.50 ACRES OF LAND IN MARION COUNTY, KANSAS; KATHERINE E. VOGEL, ET AL., AND UNKNOWN OWNERS; 864.04 ACRES OF LAND IN MARION COUNTY, KANSAS; DONALD D. HOLLAR, ET AL., AND UNKNOWN OWNERS; 150.00 ACRES OF LAND IN MARION COUNTY, KANSAS; L. C. CROWE, ET AL., AND UNKNOWN OWNERS (CLEAR CREEK, INC.),
Appellees.

Number 95-68

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

(Filed January 13, 1970)

Jacques B. Gelin, Attorney, Dept. of Justice, Washington, D.C., (Glen E. Taylor, Acting Assistant Attorney General, Raymond N. Zagone, Attorney, Dept. of Justice, Washington, D.C., Benjamin E. Franklin, United States Attorney, and Patrick K. Monahan, Assistant United States Attorney, Topeka, Kansas, on the brief) for Appellant;

William L. Oliver, Wichita, Kansas, (Martin, Porter, Pringle, Schell & Fair, Wichita, Kansas, on the brief) for Appellees.

Before LEWIS and HILL, United States Circuit Judges, and LANGLEY, United States District Judge.

HILL, Circuit Judge.

This is an appeal by the United States from a judgment and order of the District Court of Kansas confirming a Rule 71A(h), F. R. Civ. P., 28 U.S.C.A., Commission's award and distribution order in favor of appellee Clear Creek, Inc. Two narrow questions form the basis of the appeal: (1) in the process of condemning land for the Marion Dam and Reservoir Project, was a compensable interest of Clear Creek, Inc., taken; and (2) did the district court err in submitting the issue of compensability of the alleged interest to a commission?

Appellee Clear Creek, Inc., is a pipeline company formed in 1960 to transport crude oil from leases in the Marion County area to gathering stations. Prior to 1960, Mobil Oil Company and, later, Magnolia Pipeline Company, purchased the oil and trucked it to their processing plants. When Mobil and Magnolia ceased their trucking operations, Clear Creek was formed to provide a market for the oil producers in the Marion County area. Pipelines from the leases to gathering stations were laid by the appellee and division order contracts were executed by all operators, working interest owners and royalty owners who would be served by the pipelines. The content of the division orders is unique, providing that the contract is irrevocable until 4.5 million barrels of oil are run through the line. The irrevocability clause was incorporated in the contracts to insure repayment of Clear Creek's obligation in financing the construction of

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the pipeline. At the time of the taking approximately 73% of the quota had been met, with appellee's experts testifying that now the full 4.5 million barrels would never be pumped.

Of the five oil-producing tracts of land in question, settlements on two of them had been reached when Clear Creek sought to intervene on the grounds that it had a compensable interest taken by the Government's proceedings. Pursuant to Rule 71A(h) a commission was constituted and directed by the district court to report on whether Clear Creek had a compensable interest taken by the condemnation action and, if so, to fix its value. The commission found that when the Project was completed, and waters were dammed up, Clear Creek would be unable to purchase, gather or transport oil from the area. It then held that appellee "had an interest in the land condemned which amounted to an equitable servitude" and that it was entitled to compensation for the loss of those rights under the Fifth Amendment, awarding it $22,219.92.

The district court, in overruling objections of the plaintiff-appellant to the report of the Commission, attempted to correct any procedural irregularities by setting aside the legal conclusion of the commission regarding compensability of the interest and then restated the identical conclusion as its own. As a matter of law the court concluded that "a right with respect to the property taken which is valuable is compensable even though it is not technically an interest or estate in land, and the right to compensation is to be determined by whether the condemnation has deprived the claimant of valuable right rather, than by whether his right can technically be called an 'estate' or 'interest' in the land." In this regard the district court erred and we reverse.

Basically, appellee argues that its contracts are property within the contemplation of the Fifth Amendment and, having been taken by the United States, just compensation is due them. The initial portion of the hypothesis is quite correct as illustrated in numerous cases,[1] however, the theorum breaks down when it presumes that a compensable interest has been *taken*.

The division order contracts were not "taken" by the condemnation action. Clear Creek, vis-a-vis the contracts, had neither an interest nor an estate in the condemned land; their contracts concerned only the oil after it was severed from the realty. Appellee could not compel production, sue for waste or do any of the things incident to ownership. Their contracts were merely frustrated and the fact that they were irrevocable for a period of time does not elevate their stature to an interest or estate in the condemned fees.

In Omnia Commercial Company v. United States, 261 U.S. 502 (1923), the Court was faced with an analogous situation. The plaintiff had contracted to purchase a large quantity of steel plate from a Pittsburgh company. Large profits stood to be made by plaintiff, but before delivery was made the United States requisitioned the company's entire production. Omnia sued, claiming that its property in the contract had been appropriated for public use. After discussing several cases, the Court stated: "The conclusion to be drawn . . . is, that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. . . . If, under any power, a contract or other property is *taken* for public use the government is liable; but if injured or de-

1. *E.g.*, Lynch v. United States, 292 U.S. 571 (1934); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923); Johnson v. United States, 79 F. Supp. 208 (Ct. Cl. 1948).

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stroyed by lawful action, without a taking, the government is not liable." [at 510]

Just as in Omnia, Clear Creek seems to argue that taking the contract property, i.e., the oil reserves, was a taking of the contracts. This argument confuses the contracts with their subject matter. Manifestly the United States did not "take" the contracts; it was not bound by the contractual provisions nor could it enforce them. Similarly, appellee cannot compel the Government to produce and pipe oil via the appellee's pipelines until the 4.5 million barrel quota is met; neither can the United States be compelled to pay for the unintended losses to Clear Creek. The division order contracts were not "taken," but ended.

The same reasoning was used to deny recovery in Mullen Benevolent Corporation v. United States, 290 U.S. 89 (1933) where the Government took city property subject to reassessments to pay outstanding bonds. The bondholder argued that the Government's action "as effectually destroyed the chose in action as if it had seized the instruments evidencing the right." [at 94] Citing Omnia, the Court held that the landholder's property was not taken, but frustrated. In Stipe v. United States, 337 F.2d 818 (10th Cir. 1964), we held that although the taking of adjacent property substantially reduced the market value of Stipe's business and the property upon which it was located, the loss was "due to the destruction or frustration of his business, and not the taking of the property." Later, in J. A. Tobin Construction Company v. United States, 343 F.2d 422 (10th Cir. 1965), we denied recovery to a lessee who sought compensation for the taking of his business which was located on the lessor's condemned property. We said: "The decisive fact is that the Government did not take Tobin's business, it

took only the land on which the business was situated. . . . It follows that whatever loss Tobin sustained due to the frustration or destruction of his business did not amount to a taking of his property and was, therefore, not compensable." The identical theory is also found in R. J. Widen Company v. United States, 357 F.2d 988 (Ct. Cl. 1966) and Klein v. United States, 375 F.2d 825 (Ct. Cl. 1967). The facts in each of the aforementioned cases are so far identical to those in the instant suit that the rationale there applied is dispositive of Clear Creek's argument.

A further reason for denying appellee's claim is embodied in the unit rule. The basic tenor of the rule is that "[o]ne award as just compensation for the entire value of the land is made and it stands in place of the property appropriated as the equivalent thereof." Bogart v. United States, 169 F.2d 210, 213 (10th Cir. 1948). In the case at bar, the commission properly determined just compensation for all the tracts condemned but then added an additional amount for Clear Creek's interest. In so doing the very thing designed to be eliminated by the unit rule was successfully achieved. The government paid market value for the oil; that is, what the oil was worth at the well site. This is prima facie just compensation.

The appellee seeks to distinguish its situation by analogizing it to cases we find wholly inapplicable. Heavy reliance is placed upon the following statement in Adaman Mutual Water Company v. United States, 278 F.2d 842, 845 (9th Cir. 1960): "Stated more succinctly, the Government must pay for all tangible interests actually condemned and for intangible interests directly connected with the physical substance of the thing taken." This

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rule is a restatement of the law upon which we rely and does not diminish the effect of our conclusions nor does it aid appellee's cause.

In Adaman the court merely held that "under the Fifth Amendment a restrictive covenant imposing a duty which runs with the land taken, constitutes a compensable interest" in that land. United States v. Smoot Sand & Gravel Corp., 248 F.2d 822 (4th Cir. 1957) held that a riparian landowner was entitled to just compensation for sand and gravel deposits lying in a tidal estuary, a right of ownership vested by Virginia law. The case of Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) is distinguishable on several grounds: (1) Monongahela had a vested franchise right to receive tolls for the use of its lock and dam; (2) tangible property was taken; and (3) the case was decided on equitable principles of estoppel. In United States v. Puget Sound Power & Light Co., 147 F. 2d 953 (9th Cir. 1944) a franchise granting the right to erect and maintain electric light and power poles was held a compensable property right in condemned property. The interest there was deemed either an easement or a chattel real. The Second Circuit case of United States v. Brooklyn Union Gas Co., 168 F.2d 391 (2d Cir. 1948) simply stated that a public franchise is a compensable property interest. In Brooklyn Eastern District Terminal v. City of New York, 139 F.2d 1007 (2d Cir. 1944) the court concluded that the terminal's interest was more substantial than the ordinary railroad right of way (which was compensable) and was thereby a compensable interest in the condemned property. In Nicholson v. Weaver, 194 F.2d 804 (9th Cir. 1952) a lessee with an option to purchase was held to have a compensable interest in the property taken.

Each of these cases, relied upon by appellee, demonstrates the necessity of a nexus between the alleged interest and the property actually taken. Absent this indispensable link, the Government is under no obligation to make just compensation.

The final matter concerns the propriety of the district court's request that the commission draw a legal conclusion, seemingly outside the statutory scope of Rule 71A(h), F. R. Civ. P., 28 U.S.C.A. It is apparent from the cases dealing with this rule that the original referral of the legal question was error.[2] Furthermore, we think that the setting aside of the commission's determination and thereafter reinstating the identical findings of the commission as its own was an unsuccessful attempt to correct the error. To expeditiously handle condemnation suits it is imperative that Rule 71A be strictly adhered to.

The judgment of the District Court is REVERSED and the case REMANDED for disposition consistent with this opinion.

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2. *E.g.*, Scott Lumber Co. v. United States, 390 F.2d 388 (9th Cir. 1968); United States v. Atomic Fuel Co., 383 F.2d 1 (4th Cir. 1967); Chandler v. United States, 372 F.2d 276 (10th Cir. 1967).

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,
Plaintiff,

vs.

677.50 acres of Land in MARION, COUNTY, KANSAS,
Defendant.

Civil Action No. T-3545

Memorandum Overruling Objections of Plaintiff to Report of Commission

(Filed April 20, 1966)

On July 30, 1965, the Court sustained an application of Clear Creek Inc., to intervene in this proceeding (Doc. 68).

On September 24, 1965, the Court, having been requested by both plaintiff and defendants to give the Commission heretofore appointed, special instructions for considering first, whether Clear Creek Inc., has any property interest in the tracts condemned for which they are entitled to just compensation, and second, if such interest exists, to what is it entitled as just compensation. On September 27, 1965 the Court issued special instructions to the Commission. (Doc. 75).

The Commission thereafter heard evidence offered by the parties under the Court's instructions on the question of whether Clear Creek Inc. had a compensable interest in the property condemned. After a full evidentiary hearing the Commission on February 8, 1966 prepared and filed its report (Doc. 99) in which it determined that Clear Creek Inc. has an interest in the land condemned which amounted to an equitable servitude binding upon the land taken, and by reason thereof, Clear Creek Inc.

has lost the interest it derived from such servitude. That the loss is compensable since the government has destroyed the rights connected with the physical substance of the land and by the taking, the government substituted itself for the landowners, lessees, royalty owners and operators. Clear Creek Inc. is entitled to compensation from the condemnor for the taking of its rights.

Thereafter and on February 18, 1966, plaintiff filed extended objections to the report of the Commission contending that it was erroneous and contrary to law to determine that Clear Creek had an interest in the property condemned which entitled it to just compensation. Plaintiff also complains that it was error for the Court to refer this issue to the Commission for determination, citing *United States* v. *19.69 Acres of Land*, 4th C.A. 334, F.2d 229.

> "Since the matter has again come before this Court for further consideration and in order that the question of procedure may be eliminated from this proceeding which has already become somewhat complicated, the Court now reviews the record before it and sets aside the conclusion and determination of the Commission set forth in its report and now finds that Clear Creek Inc., the intervenor herein, has an interest in the property condemned which amounted to a binding equitable servitude upon the property acquired, which interest when taken by plaintiff is an interest for which just compensation must be made within the requirements of the Fifth Amendment to the United States Constitution, as reinforced by the Fourteenth Amendment."

Plaintiff complains that error is committed by the Commission in ruling that Clear Creek has an interest in the property condemned without specifying the tract of land the ruling involved. This situation can easily be clarified. The Court now finds and conclude that its

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determination that Clear Creek has a compensable interest in the property acquired by plaintiff and taken in this proceeding, shall apply to all takings by the plaintiff in the project wherein the existence of such interest of Clear Creek is established by competent evidence, and the Commission hearing the cases involved in this Marion Reservoir Project is now so instructed.

Except as modified in this memorandum, the Court now adopts and approves the findings submitted by the Commission in its report filed February 8, 1966 as the findings of this Court.

The Court further concludes as a matter of law that while the interest which entitles a party to compensation must have a direct and actual concrete connection with the specific tract of land taken, still, a right with respect to the property taken which is valuable is compensable even though it is not technically an interest or estate in land, and the right to compensation is to be determined by whether the condemnation has deprived the claimant of valuable right rather than by whether his right can technically be called an "estate" or "interest" in the land.

The other objections of the plaintiff have been considered and are denied.

IT IS SO ORDERED.

DATED at Topeka, Kansas this 20th day of April, 1966.

/s/ George Templar
United States District Judge

ATTEST: A true copy

Charles W. Cahill
Clerk
By /s/ (Illegible)
Deputy

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1397

CLEAR CREEK, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION

The opinion of the district court (Pet. App. A 9-11) is not reported. The opinion of the court of appeals (Pet. App. A 1-8) is reported at 420 F. 2d 1136.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1970. The petition for a writ of certiorari was filed on April 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

384-332—70

QUESTION PRESENTED

Whether a pipeline company, which had contracted to buy and distribute all oil produced from certain lands, was entitled in a condemnation proceeding to compensation for an interest in the land or merely suffered a noncompensable frustration of its business contract.

STATEMENT

The United States brought these condemnation actions to acquire fee title to five tracts for the Marion Dam and Reservoir Project on the Cottonwood River in Kansas. The declaration of taking included the following recitation:

> The estate taken for the said public uses is all right, title, and interest in and to the subsurface estate, or any interest therein, including all oil, gas and other minerals, together with all rights of ingress and egress over the surface of the land for the purpose of exploration, development, production and removal of said oil, gas and other minerals * * *.

After the government had settled with all the landowners, royalty owners and operators of two tracts, and trial on the remaining three tracts was pending, Clear Creek, Inc., a pipeline company which had been formed to operate a gathering service for the oil-producing operators in the area and had entered into a contract to buy and distribute all the oil produced from the lands taken, sought to intervene on the ground that by virtue of its irrevocable agreement to buy at least 4.5 million barrels of oil, which was frus-

trated by the government's condemnation action, it had a compensable interest in the land taken.

Over the government's objection, the district court directed the commission appointed under Rule 71A (h), F.R. Civ. P., to report on whether Clear Creek had a compensable interest in the land taken. The commission reported that Clear Creek had an interest in the land condemned that amounted to an "equitable servitude." Accordingly, the commission made an award in favor of Clear Creek over and above the amount awarded to the holders of interests in the land. The district court confirmed the commission's awards.

On the government's appeal to the United States Court of Appeals for the Tenth Circuit, the judgment was reversed. The court (Pet. A 4) held that:

> The division order contracts were not "taken" by the condemnation action. Clear Creek, vis-a-vis the contracts, had neither an interest nor an estate in the condemned land; their contracts concerned only the oil after it was severed from the reality. Appellee could not compel production, sue for waste or do any of the things incident to ownership. Their contracts were merely frustrated and the fact that they were irrevocable for a period of time does not elevate their stature to an interest or estate in the condemned fees.

The court also held that awarding Clear Creek compensation above that fixed for the owners of interests in the land taken violated the unit rule, which requires valuation of the property taken as a whole, rather than valuation of constituent elements inhering in

the property. Finally, the court held that by referring the legal issue of compensability to the commission, the district court had violated Rule 71A(h), F.R. Civ. P.

ARGUMENT

The court below properly concluded that in condemnation the Fifth Amendment requires the United States to pay only for the taking of vested property rights, not for the loss of business opportunities, which is the essence of Clear Creek's claim. In *Omnia Co.* v. *United States,* 261 U.S. 502, this Court held that the government was not liable for the frustration of a lucrative contract to purchase a large quantity of steel at a favorable price when the United States requisitioned the manufacturer's entire production for one year, stating (261 U.S. at 513), "[f]rustration and appropriation are essentially different things." So, also, in *Mitchell* v. *United States,* 267 U.S. 341, recovery was denied a canner seeking compensation for the destruction of his business when the government took the land on which he used to grow corn of a special grade and quality. And the Court has repeatedly recognized that "the existence of value alone does not generate interests protected by the Constitution against diminution by the government * * *." *Reichelderfer* v. *Quinn,* 287 U.S. 315, 319. The United States pays only for the taking of vested property rights, not for "opportunities which the owner may

lose." *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282.[1]

Every case upon which petitioner relies (here and in the court of appeals) involved the taking of a recognized property interest in land: a leasehold, *United States* v. *General Motors Corp.*, 323 U.S. 373; a lien amounting to an equitable servitude, *Adaman Mutual Water Company* v. *United States*, 278 F. 2d 842 (C.A. 9); franchises and physical assets constructed at the instance and implied invitation of Congress, *Monongahela Navigat'n Co.* v. *United States*, 148 U.S. 312;[2] a riparian owner's vested rights under state law to sand and gravel deposits in a tidal estuary, *United States* v. *Smoot Sand & Gravel Corporation*, 248 F. 2d 822 (C.A. 4); a franchise amounting under state law to a chattel real, *United States* v. *Puget Sound Power & Light Co.*, 147 F. 2d 953 (C.A. 9); a fran-

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[1] See, also, *Joslin Co.* v. *Providence*, 262 U.S. 668, 675; *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377–378; *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94–95; *Bothwell* v. *United States*, 254 U.S. 231, 233; *Scully* v. *United States*, 409 F. 2d 1061, 1065 (C.A. 10), certiorari denied, 396 U.S. 876; *Mollohan* v. *Gray*, 413 F. 2d 349 (C.A. 9); *Acton* v. *United States*, 401 F. 2d 896 (C.A. 9), certiorari denied, 393 U.S. 1121, 395 U.S. 945; *United States* v. *Cox*, 190 F. 2d 293, 295–296 (C.A. 10), certiorari denied, 342 U.S. 867; *Osborne* v. *United States*, 145 F. 2d 892, 896 note 5 (C.A. 9); *Stipe* v. *United States*, 337 F. 2d 818, 821–822 (C.A. 10); *Hooten* v. *United States*, 405 F. 2d 1167 (C.A. 5); *J. A. Tobin Construction Company* v. *United States*, 343 F. 2d 422 (C.A. 10); *R. J. Widen Company* v. *United States*, 357 F. 2d 988 (C. Cls.).

[2] This Court has subsequently explained that *Monongahela* rested "primarily upon the doctrine of estoppel." *Omnia Co.* v. *United States*, 261 U.S. 502, 513–514; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 281; *United States* v. *Rands*, 389 U.S. 121, 126.

chise, gas mains and services, electrical ducts, cables, and other physical facilities, *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391 (C.A. 2); and a substantial interest in real property—a terminal company's 10-year grant, with renewal option, to erect and maintain major freight-handling structures in a municipal market, *Brooklyn Eastern Dist. Terminal* v. *City of New York*, 139 F. 2d 1007 (C.A. 2), certiorari denied, 322 U.S. 747.

The decision below does not conflict with any decision of this Court or any of the courts of appeals. The United States has never been required to pay for the frustration of a contractual right or the loss of a business opportunity where the claimant failed to establish an interest or estate in the land taken.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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